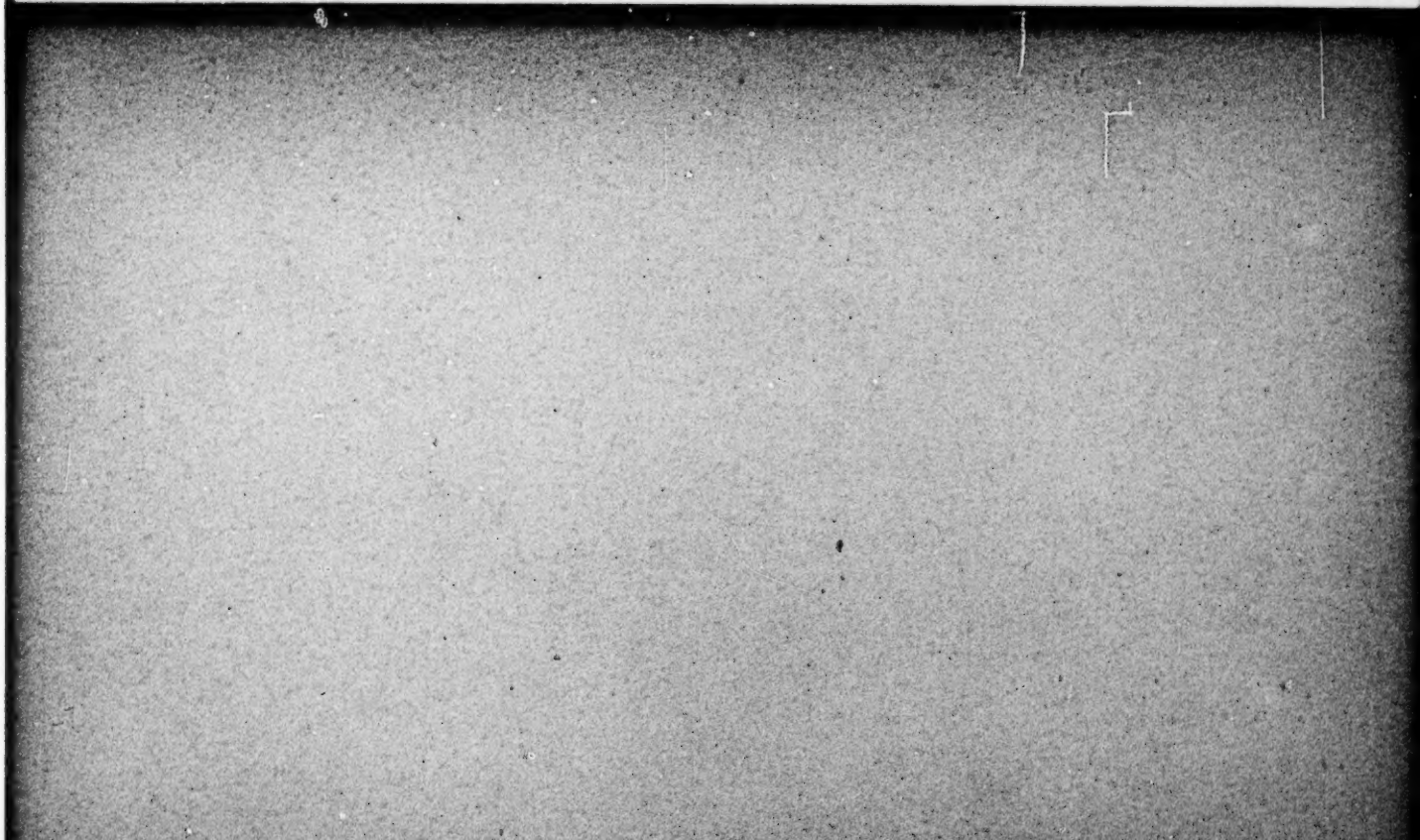

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

BRIEF FOR PETITIONERS

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TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, reported at 500 F.2d 127 (1974), is reprinted as Appendix A to the petition for a writ of certiorari. The opinion of the United States District Court for the Western District of Pennsylvania, reported at 356 F. Supp. 271 (1973), is reprinted as Appendix B to the petition.

Jurisdiction

The judgment of the Court of Appeals, Appendix C to the petition, was entered on June 21, 1974. A timely petition for a writ of certiorari was docketed on October 18, 1974. This Court granted the writ on December 16, 1974. Jurisdiction here is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on 28 U.S.C. §1338.

Questions Presented

Over 5,000 commercial establishments, including restaurants, hotels and other places catering to the public, pay nearly one-quarter of a million dollars annually to the composers, authors and music publishers whose copyrighted musical compositions are broadcast by radio stations, received in the establishments, and played over loudspeakers to entertain customers and employees. Another two million dollars is paid by background or wired music operators, like Muzak, who service an additional 75,000 commercial establishments pursuant to related contractual arrangements.

These establishments using radio receivers and loudspeakers have entered into license agreements to pay these substantial fees because in 1931, in an unanimous opinion by Mr. Justice Brandeis, this Court held that when a commercial establishment makes available to its customers musical compositions transmitted by a broadcaster through the instrumentality of a radio receiver and loudspeakers installed by the establishment and wholly under its control, it "performs" those compositions publicly for profit within

the meaning of Section 1 of the Copyright Act of 1909, now 17 U.S.C. §1(e). *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). The court below declined to apply this Supreme Court decision on identical facts. It conceded that the present case is "on all fours" with *Jewell-LaSalle*. But it concluded that two recent decisions of this Court involving cable television (CATV) systems—*Fortnightly Corp.* v. *United Artists*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS*, 415 U.S. 394 (1974)—had, albeit without saying so, consigned *Jewell-LaSalle* to the dustbin of history.

In so ruling, the court below misconstrued the CATV decisions, undermined an important rule of law established four decades ago and adhered to throughout the world, and jeopardized the material well-being of America's composers, authors and music publishers who have over the past 40 years come to depend upon the business relationships evolved in legitimate and justified reliance upon *Jewell-LaSalle*.

The questions presented are as follows:

1. Should not this Court protect the integrity of its unanimous decision in *Jewell-LaSalle*, which, although "confined to its facts" in recent years by a majority of this Court, has not been overruled?

2. The ultimate question is whether there has been a "performance" within the meaning of the Act. Must the same answer arrived at for CATV systems, which assist a viewer to watch his own television set in the privacy of his own home, be needlessly applied to commercial estab-

lishments using loudspeakers to make broadcast music available to customers and employees in such public places as hotels and restaurants?

3. Under the "functional" test articulated in the CATV decision, it is concededly a "performance" for a restaurant to provide copyrighted music to its customers and employees through the instrumentality of records, tapes, background music or live orchestras. Does it make sense to reach a contrary conclusion when a restaurant's radio receiver and loudspeakers accomplish the same purpose?

4. Should not the CATV decisions be construed in the context of the new industry from which they arose, and not unnecessarily and heedlessly extended to the music world in a way that would disrupt important business relationships evolved in legitimate and justified reliance upon *Jewell-LaSalle*?

5. Since 1931 it has been a "performance" within the meaning of the Copyright Act for a commercial establishment to receive radio broadcasts of copyrighted musical compositions and make them available to customers and employees over loudspeakers under its control. Is it not still a "performance" for a commercial establishment to do the same thing today, especially where a vital and culturally significant industry has grown up in the past 40 years in legitimate reliance upon that authoritative ruling, and where the Congress has not only repeatedly declined to reject the ruling but has repeatedly incorporated it in proposed revisions to the Copyright Act?

6. This Court spared the new CATV industry copyright liability because it did not want to expose the industry

retroactively to a burden not previously borne. Should not the Court reach a different result with respect to music where the equities are to the contrary—where there are long-established practices that have developed in good faith reliance upon an authoritative ruling that commercial establishments *are* liable for copyright infringement when they receive copyrighted musical compositions broadcast by others and make them available to their customers and employees over loudspeakers?

Statute Involved

Section 1 of the Copyright Act, 17 U.S.C. §1, provides in pertinent part:

> "§1 Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced. * * * And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of

> 2 cents on each such part manufactured, to be paid by the manufacturer thereof. * * * The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. * * *"

There are only two exceptions to the grant of the exclusive right of "public performance for profit". One is contained in the last paragraph of Section 1(e), and provides:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

The other exception is contained in Section 104 of Title 17, and exempts certain nonprofit, charitable, and educational performances. It provides:

> "* * * That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

Statement of the Case

A. The Factual Background

1. The Performance by Aiken

Respondent George Aiken owns and operates a chain of fast food restaurants in Pittsburgh, Pennsylvania. On March 11, 1972, the customers and employees in one of his restaurants were entertained by renditions of two popular musical compositions: "The More I See You", whose copyright proprietor is petitioner Twentieth Century Music Corporation, and "Me and My Shadow," whose copyright proprietor is petitioner Mary M. Bourne. (App. 8A, 9A; C.P. App. B2)*

These two songs were broadcast that day by Pittsburgh radio station WKJF-FM, a licensee of the American Society of Composers, Authors and Publishers ("ASCAP"), of which organization petitioners are members. The broadcast was received upon a radio receiver in Aiken's establishment and transmitted over five loudspeakers. Three were in the public portion of the restaurant; the others, in places accessible only to employees. It was Aiken's practice to turn his receiver on each morning and thus to entertain his customers and employees throughout the day. Aiken had no license publicly to perform copyrighted music. (App. 61A; C.P. App. B2-3)

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* The (App. 8A, 9A) reference is to the printed Appendix; the (C.P. App. B2) reference is to the appendices to the petition for a writ of certiorari, where the opinions below are printed.

2. *ASCAP's Licensing System*

ASCAP was organized in 1914 as a non-profit, unincorporated membership association—essentially a cooperative of authors, composers and music publishers. Its purpose was to prevent piracy and to license performance rights of its members' musical compositions. A 1941 consent decree, as amended in 1950 in *United States* v. *ASCAP*, 1950 Trade Cases, ¶62,595, at p. 63,750 (S.D.N.Y. 1950), requires that ASCAP's fees be reasonable, non-discriminatory and uniform, and provides a simple judicial remedy for any party who questions the reasonableness of the rates. For a fuller description of ASCAP, its role as a non-exclusive licensing agency for its members, and the impact of the decree, see *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968).

ASCAP has negotiated licenses for performances of its members' musical compositions by hotels and restaurants employing radio receivers and loudspeakers to entertain customers and employees since shortly after this Court held in 1931 that such licenses were required. Presently some 5,150 restaurants, hotels and similar establishments are parties to such licenses.* ASCAP does not require licenses from so-called "Mop and Pop" stores—small establishments that use a home-type radio receiver without

* The trial court found as a fact that the rule in *Jewell-LaSalle* had been consistently applied to restaurants as well as hotels, and that both kinds of establishments had routinely entered into licenses with ASCAP, although there are contrary intimations in *Nimmer on Copyright* §107.41, at p. 410 n. 204 (1968), which was cited in *Fortnightly*, 392 U.S. at 405 n. 3. (C.P. App. B6 n. 4.) In the 1974 replacement pages for p. 410 of his treatise, Mr. Nimmer concedes that his original footnote was "misleading."

additional loudspeakers. (App. 29A-30A; C.P. App. B3) The license, which in the case of Aiken's establishment would cost only $5.00 a month, authorizes the performance of the entire repertory of copyrighted music written or published by ASCAP members. The same license also authorizes the use of tapes and recorded music without additional payment. (App. 43A)

ASCAP's licenses with broadcasters, including WKJF-FM in Pittsburgh, expressly negate the right of the broadcaster itself to license receivers of broadcasts to perform publicly for profit. That reservation provides:

> "Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever." (App. 28A; C.P. App. B3 n.1).

This provision has been included in ASCAP licenses with broadcasters since 1932. See Warner, *Radio and Television Rights*, §133e (1953); Varmer, "Limitations on Performing Rights," 89 (1958) in 2 *Studies on Copyright* 835, 845 (Fischer Mem. Ed. 1963). Cf. *Society of European S.A.A.C.* v. *New York Hotel Statler Co.*, 19 F.Supp. 1 (S.D.N.Y. 1937), where the broadcaster's license contained such a provision. As a result of this provision, the broadcaster's license applies only at the point of broadcast; the license fees negotiated with broadcasters since 1932 reflect the fact that ASCAP reserves the right separately to

license public performances for profit by commercial establishments receiving broadcast music.*

In addition to the 5150 commercial establishments licensed by ASCAP publicly to perform radio music copyrighted by its members, another 75,000 hotels, restaurants and other commercial establishments use background music whose purveyors, such as Muzak, are licensed by ASCAP to provide such music by wire or multiplex FM (a point-to-point service not available to the public). Unlike the broadcaster licenses, these licenses do include the right to reproduce music at the places where loudspeakers are installed. Muzak and its franchises contended below that they compete with FM radio, and that their licensees will not pay as much for background music as they now do if they can obtain radio music free of license obligation. The trial court found that a decision in favor of Aiken "might have an effect on a pending request for reduction of licensing fees which has been filed by Muzak affiliates." (C.P. App. B4).

These long established business relationships yield $2,346,000 annually in fees to ASCAP for its member composers, authors and music publishers—$246,000 from licensed commercial establishments using radio and loudspeakers, and $2,100,000 from Muzak-type licenses. (App. 30A)

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* Herman Finkelstein's testimony at trial regarding 1941 negotiations relating to this provision reflected his own personal experience in the matter, which began in that year. (App. 29A) As the Warner and Varmer studies and the 1937 *Statler* decision show, the contractual provision in question has in fact been in use since shortly after the decision in *Jewell-LaSalle*.

B. In the District Court

Petitioners brought suit in the United States District Court for the Western District of Pennsylvania on June 2, 1972 to restrain Aiken's infringement of their copyrights and for the statutory damages of $250 per composition.

After a full trial, Judge Weis, who only a few days earlier had been appointed to the Court of Appeals, granted the monetary relief sought. He held that Aiken had done precisely that which this Court held in *Jewell-LaSalle* was a public "performance" for profit requiring a license. He concluded that failure to follow this Court's 1931 decision would jeopardize established business relationships developed in legitimate reliance upon that decision. He found that were he not to follow *Jewell-LaSalle,* commercial establishments would discontinue paying license fees for the use of broadcast music, and the fees that Muzak and similar services now pay for their rights might be adversely affected. (C.P. App. B4)

Judge Weis expressly rejected Aiken's argument that a contrary result was required by this Court's decision in *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390 (1968). He noted that, although this Court had discussed *Jewell-LaSalle* in *Forthnightly,* it had expressly declined to overrule it. And he observed that, whereas the present petitioners sought only to protect established business relationships, the *Fortnightly* plaintiffs had sought to impose a new kind of liability retroactively upon an infant industry. (C.P. App. B6)

C. In the Court of Appeals

The Court of Appeals reversed, although it conceded that *Jewell-LaSalle* appeared to require affirmance of the trial court's decision. Indeed, the Court of Appeals admitted that Judge Weis "was faced with an 'all fours' decision' in *Jewell-LaSalle.*" And it did not dispute petitioners' position that failure to honor the rules of *Jewell-LaSalle* would deprive ASCAP's member composers, authors and publishers of nearly $250,000 in license fees annually, quite apart from the more than $2,000,000 received from the background music operators, who contend their fees should be reduced if commercial establishments are freed of license obligations in connection with radio music. But it insisted that *Fortnightly,* as amplified in *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974), had changed the meaning of the word "performance" for purposes of the Copyright Act—even in factual circumstances concededly identical to those in *Jewell-LaSalle.* After *Fortnightly* and *Teleprompter,* said the court, what Aiken did in his restaurant was no longer a "performance," even if it had been one for 40 years.

Summary of Argument

This Court does not lightly overrule prior decisions which interpret complex statutory schemes and thereafter receive legislative assent. There are powerful reasons not to do so here.

First, there is no basis for distinguishing the present case from *Jewell-LaSalle;* as the court below recognized, the cases are on "all fours." Second, *Jewell-LaSalle* has

not been overruled by this Court; in the CATV cases, *Jewell-LaSalle* was left to govern in its own sphere. Third, application of the "functional" test used by the majority in the CATV cases does not require the overruling of *Jewell-LaSalle;* the conduct of respondent Aiken is the exact functional equivalent of the use in public places of live orchestras, records and background music to entertain customers and employees—and no one disputes that these are "performances" for copyright purposes. Were there any doubt, it should be laid to rest by the fact that *Jewell-LaSalle's* approach is followed in Britain, Canada, Australia, France, Germany and elsewhere, and has been incorporated into every copyright revision bill introduced in Congress since 1957. Finally, intricate business relationships of immense importance to the economic health of music in America have developed in legitimate and justified reliance upon this Court's decision in 1931, and are entitled to vindication.

ARGUMENT

I.

Jewell-LaSalle controls the present case.

Jewell-LaSalle came to this Court on a certified question:*

> "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers installed in his hotel and under his control and for the entertainment

* A companion case, *Jewell-LaSalle Co.* v. *Buck,* 283 U.S. 202 (1931) raised three other certified questions, relating only to certain damage issues.

> of his guests, the hearing of a copyrighted musical composition which has been broadcast from the radio transmitting station, constitute a performance of such composition within the meaning of 17 U.S.C. Sec. 1(e)?" 283 U.S. at 196

An unanimous Court, speaking through Mr. Justice Brandeis, ruled that such acts were a performance under the Copyright Act of 1909. The Court held that in making radio music available to its guests the commercial establishment in question had "reproduced," rather than merely "audited," the original broadcast. It held:

> "There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control." 283 U.S. at 201.

All four of the judges who have previously considered this case have rejected respondent's argument that it can be distinguished from *Jewell-LaSalle* on the tenuous ground that the original broadcaster here is an ASCAP licensee, whereas the original broadcaster in the 1931 decision was unlicensed. They are correct; the cases cannot be so distinguished, and *Jewell-LaSalle* governs the case before the Court.

Mr. Justice Brandeis pointedly observed that the only question before the Court in *Jewell-LaSalle* was whether "reception for commercial purposes" was a "performance" within the meaning of the Act. All other questions were rigorously avoided, including the contention that even

if there were a "performance," it was not a public performance for profit. 283 U.S. at 202.

Mr. Justice Brandeis referred to the original broadcaster being unlicensed* only in contexts *unrelated* to the question whether there was a "performance". For example, he observed that the lack of a relationship between the unlicensed original broadcaster and the hotel proprietor eliminated the possibility of predicating liability against the latter on a theory of contributory infringement. 283 U.S. at 197 n. 4. And he stated there was no occasion to determine "the effect upon others of [the broadcaster's] paying a license fee"—not because the original broadcaster was in fact unlicensed, but because "radio reception for profit *in itself* constitutes infringement." 283 U.S. at 198 (emphasis added).

In a footnote the Justice suggested that had the original broadcaster been licensed, the hotel proprietor might have been able to argue that he was the beneficiary of an "implied license" to engage in "commercial reception and distribution." 283 U.S. at 199 n. 5. But the defense suggested in the footnote ceased to be available within a year of the decision, when the present form of broadcast license was developed. Since 1932 ASCAP's licenses with broadcasters have expressly negated any right on the part of a broadcaster impliedly or otherwise to license performances by those who commercially receive and distribute broadcast music. Since 1932 the license fees paid by broadcasters have taken into account the fact that they pay only for the right to broadcast and do not pay for the performance

* The fact was not adverted to in the question certified to the Court.

rights of others. In short, the implied license defense hinted at in the aforementioned footnote ceased to exist in 1932 and cannot now serve to distinguish *Jewell-LaSalle*.

Even more damaging to respondent's argument, the very premise of the "implied license" defense is that the commercial establishment receiving a licensed broadcast and amplifying it over loudspeakers *does* thereby "perform" within the meaning of the Act. Otherwise, it would not require a license.

The thrust of *Jewell-LaSalle* is unavoidable. Just as one who hires an orchestra to entertain customers and employees must honor the rights of the copyright proprietors, so too must he who "tunes in on a broadcasting station, for his own commercial purposes." 283 U.S. at 198: For "commercial reception," said the Court with an undivided voice, is a statutory "performance." The Court did suggest that, as a matter of policy, some other arrangement, perhaps relying exclusively upon broadcast licensing, might be desirable. But it noted that "the existing statute makes no exception." 283 U.S. at 199. The statute has not been changed.

II.

Jewell-LaSalle has not been overruled.

Jewell-LaSalle has never been overruled by this Court. Prior to 1968, its soundness was never questioned. In 1968, in *Fortnightly Corp.* v. *United Artists,* the Court was asked to extend the rule of *Jewell-LaSalle* to the novel technological circumstances presented by the CATV industry. The question was whether it was a "performance" under

the Act when a CATV system intercepted a local television signal and functioned as an antenna, enhancing its subscribers' pre-existing ability to receive the signal on their own television receivers in the privacy of their own homes. The CATV industry was new. It had never recognized any obligation to pay license fees to the proprietors of intercepted materials. Not one cent had ever been paid for such use by any CATV system to any copyright proprietor. The question, as this Court expressly recognized, was whether such liability should newly be created and retroactively applied. A majority declined to do so, holding that *Jewell-LaSalle* "must be understood as limited to its own facts." 392 U.S. at 397 n. 18. For purposes of determining CATV liability, it concluded that the question was whether CATV was "functionally" more like a "passive viewer" than an "active" broadcaster. The issue was resolved in favor of the economic status quo, freezing the present situation in which CATV was totally outside the copyright system. From that decision, Mr. Justice Fortas dissented. Three other members of the Court, Justices Douglas, Marshall and Harlan, did not participate.

In 1974 the Court was asked to decide whether *Fortnightly* reached other facets of CATV operations. *Teleprompter Corp.* v. *CBS* involved interception of distant signals by CATV systems that also originated their own programs and sold advertising on these programs. A majority once again resolved the question in favor of the status quo in the CATV industry, which continued to pay no license fees to copyright proprietors of retransmitted material. Once again, the Court chose not to disrupt existing economic patterns by retroactive imposition of a crushing liability, leaving to Congress the question whether to

create liability where for so long there had been none. From this decision, the Chief Justice and Justices Douglas and Blackmun dissented. But no member of the Court suggested that the decision in favor of the status quo in the CATV industry required the overruling of *Jewell-LaSalle* in its own field. Indeed, the majority did not even cite *Jewell-LaSalle*. No Justice wrote that composers, lyricists and music publishers should now go unpaid when hotels and restaurants—long accustomed to pay for the privilege—exploit copyrighted compositions for profit-making purposes.

III.

The "functional" approach of the CATV cases does not require the overruling of *Jewell-LaSalle*.

Even if one were not to take this Court at its word, and assume that when the Court said *Jewell-LaSalle* was to be confined to its facts it meant something else, the decision below is incorrect. For the "functional" approach applied in the CATV cases does not absolve respondent Aiken of his statutory obligation to compensate petitioners when he exploits their music for commercial purposes.

A. Respondent Aiken's Conduct Is Functionally Equivalent to Conduct Universally Regarded as a "Performance" Within the Meaning of the Copyright Laws.

The ultimate question is whether respondent Aiken "performed" petitioners' music when he received the copyrighted compositions broadcast by WKJF-FM and made them available over loudspeakers to customers and em-

ployees. For nearly a century in attempting to determine what constitutes a "performance" for copyright purposes, courts have drawn upon the model of the private citizen singing a song for his own amusement in the privacy of his own home. See e.g., Brett, M. R., in *Wall* v. *Taylor*, 11 Q.B.D. 106-07 (1882):

> 'Singing for one's own gratification without intending thereby to represent anything, or to amuse anyone else, would not, I think, be either a representation or performance, according to the ordinary meaning of these terms, nor would the fact of some other person being in the room at the time of such singing make it so; . . ."

The great British copyright authority, Thomas Scrutton, concurred, adding:

> "It is submitted that this must be taken with a further limitation that the performance, to be an infringement of the right of another must be such as to affect the commercial value of that right either by giving profit to the performer or depriving the proprietor of copyright of profit," citing *Duck* v. *Bates*, 3 Q.B.D. 843 (1884). Scrutton on Copyright (4th Ed. 1903), pp. 102-103.

No one denies that should respondent Aiken sing to himself "The More I See You" or "Me and My Shadow" while taking a shower, he would incur no liability for copyright infringement.

Foreign courts have uniformly contrasted this archetype of 'non-performance" with the reproduction of radio music in a hotel, restaurant, public house or factory. In Britain, for example, a long line of cases has established the rule that reception of radio music, even from a licensed

broadcaster, for use in a hotel, pub, or factory workroom is—unlike singing in a shower—a public performance. The leading case is *Performing Right Society, Ltd.* v. *Hammond's Bradford Brewery Company,* 150 L.T. Rep. 119, at 122 (Ct. of App. 1934), where Lawrence, L.J., said:

> "I find it impossible to escape from the conclusion that the owner of a receiving set who puts it into operation causes an acoustic representation of a musical work which is being broadcast to be given at the place where the receiving set is installed and is, therefore, himself performing or authorizing the performance of the musical work . . . ."

See also *Performing Right Society, Ltd.* v. *Camelo,* 3 All E.R. 557 (Ch. Div. 1936) (radio music from private room audible in pub); *Ernest Turner Electrical Instruments, Ltd.* v. *Performing Right Society,* 168 L.T. Rep. 285 (Ct. of App. 1943) (radio and phonographic music used in factory). These decisions were accepted by the draftsmen of the British Copyright Act of 1956, 4 & 5 Eliz. 2, ch. 74, §48(6), who declared the "occupier of premises" where a radio plays copyrighted work to be a performer thereof. See Carter-Ruck & E. P. Skone James, Copyright 221 (1965); Copinger & E. P. Skone James on Copyright §§527, 528, at pp. 224-25 (1971). The Canadian cases are in accord. See, for example, *Canadian Performing Right Society* v. *Ford Hotel, Ltd.,* 2 D.L.R. 391 (1935).

In *Society of European S.A.A.C.* v. *New York Hotel Statler Co.,* 19 F. Supp. at 6, Judge Woolsey described the *Hammond's Brewery* and *Ford Hotel* cases as follows:

> "The original broadcasters in both cases had licenses for 'broadcasting for domestic and private use only,' and in both cases it was held, under copyright statutes

substantially like ours, that the defendants, who were owners of hotels, were guilty of infringement of the plaintiffs' copyrights in receiving broadcasts of copyrighted musical compositions and reproducing them for their guests."

In the CATV cases this Court assumed that a private citizen watching television in his own home does not thereby "perform" for purposes of the Copyright Act.* The Court proceeded, however, to inquire whether a CATV system that enhances the private citizen's ability to receive an adequate signal, or even to make reception possible, is to be treated as closer to the model of the private citizen in his home than to that of the broadcaster. One may question the conclusion drawn by the Court. Indeed, four Justices dissented. But that conclusion is not dispositive of an inquiry directed to the commercial establishment that receives radio music and makes it available through loudspeakers for the amusement of customers and employees. It is difficult to identify such an establishment either with the citizen enjoying radio or television in the privacy of his home, or with the CATV system that facilitates such a purely private audition or viewing.

Here, there are much more compelling analogies—with the hotel keeper or restaurant owner who, to entertain customers and employees, hires an orchestra or singer to provide live music, or plays phonograph records, or arranges for a background music service. As to these analogies, the answer has never been in doubt. These *are* "performances" for copyright purposes. See, for example, Mr.

* In *Jewell-LaSalle*, Mr. Justice Brandeis had cautiously declined to pass on the question whether the mere turning on of a radio set in one's own home constitutes a performance, for "even if this be deemed a performance, it is neither public nor for profit." 283 U.S. at 196.

Justice Holmes' landmark opinion for this Court in *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917) (use of live singers or an orchestra in a restaurant or hotel is a public performance for profit); *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3rd Cir. 1964) (playing of records in a public place is a performance); and *Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3rd Cir. 1959) (use of background music service is a performance by the restaurant owner as well as by the purveyor of the service).

If one were to disregard the explicit language of *Fortnightly Corp.*, assume that *Jewell-LaSalle* no longer governs even in its own sphere, and newly apply to these facts the same "functional" test used by the *Fortnightly* majority, who can reasonably deny that respondent Aiken's commercial use of a radio receiver and multiple loudspeakers is the exact "functional" equivalent of his using a background music service, or phonograph records, or a live orchestra for the identical purpose? Aiken's conduct is certainly closer to these classic types of "performance" than to the hypothetical man singing in his own shower. Accordingly, like them, it is a "performance" under the Act.

Any decision that respondent Aiken's conduct is not "functionally" a performance would be inconsistent with the well-established rulings that the use of live orchestras or records or background music in a hotel, restaurant or other public place is a performance within the meaning of the Act. The only viable alternative to regarding this case as settled by *Jewell-LaSalle* is to treat respondent Aiken for what he is—the "functional" equivalent of the user of live orchestras, or records, or background music services, and to require that he pay a modest fee to the composers, authors and music publishers whose art and craft he wishes to expropriate for his own commercial purposes.

B. *Jewell-LaSalle* Is Supported by the Rules in Other Jurisdictions and by Current Legislative Thinking.

***1. Other Countries Follow* Jewell-LaSalle.**

Jewell-LaSalle is not anomalous. As the cases cited at p. 20 *supra* demonstrate, the 1931 decision of this Court finds support in similar decisions in other jurisdictions. British and Canadian judges, for example, have consistently concluded that use of a radio and loudspeakers to reproduce broadcast music in a public place *is* a performance. If *Jewell-LaSalle* is an anomaly, it has been a contagious one.

Nor is support for *Jewell-LaSalle* confined to the aforementioned decisions. It is a general rule abroad that a restaurant, hotel or like establishment that uses a radio receiver and loudspeakers to make broadcast music available to customers and employees thereby "performs" copyrighted compositions so received and must obtain consent from the proprietors of the copyright.

The tariffs contained in the Appendix to this brief reflect world practice. In Britain, for example, the Performing Right Society, Ltd. publishes and enforces tariffs which provide, among other things, that restaurants, hotels and other public places using radios or other mechanical means to provide music for customers, guests and employees, must pay graduated annual fees. Standard Tariff "H", for example, imposes an annual fee of £4 upon a restaurant with not more than 15 seats that uses radio to perform copyrighted musical compositions, and an additional £1.50 for each additional ten seats or part thereof up to 75 (App. A1-2 hereto). Standard Tariff "RH" imposes comparable fees for use by residential hotels to perform copyrighted music (App. B1 hereto). Effective January 6,

1975, the rate for restaurants has been increased to £7 for the first 15 seats and £2.60 for each additional 10 seats up to 75 (App. C4 hereto). In Australia, the tariff of the Australasian Performing Right Association, Ltd., APRA, is $10 per year for restaurants, plus an additional 25 cents for each additional speaker (App. D2 hereto).* The comparable tariff of the French Performing Right Society, SACEM, is at App. E1-3 hereto; the translation of the West German Performing Right Society, GEMA, is at App. F1-4 hereto.

In Canada, despite judicial determination that use of the radio or phonograph in a public place is a "performance," there is no tariff for such use. The Canadian legislature, as a matter of legislative policy, has determined to transfer the obligation to pay for such performances from the restaurant owner to the broadcasters and record manufacturers. Section 50(7) of the Canadian Copyright Act, 1970 Revised Statutes, Ch. C-30, reads as follows:

> "In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable

* APRA's definition of "performance" is instructive:

> "In general, performances of music "in public" are those given outside the precincts of the home. The means of performance are immaterial and it does not matter whether recordings, tapes, radios or television sets are employed or whether the music is played "live" by musicians. Similarly, it does not matter why the performance is given, where it is given or whether any charge is made. What does however matter is the playing of music in other than domestic circumstances. Those responsible must obtain permission: this means the proprietors, their managers or agents, or the occupiers of the premises concerned, or even the organisers themselves for locations not already covered under prior arrangements with APRA." (App. D1 hereto)

> from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same; in so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection."

Thus, in Canada,* as to the use of radios or phonographs in public places, the legislature, while recognizing that such uses do involve "performances," has adopted something like the alternative mode of enforcing the copyright proprietor's rights mentioned by Mr. Justice Brandeis in his *Jewell-LaSalle* opinion. 283 U.S. at 199.

The foregoing materials are not exhaustive, but they should suffice to establish that the rule in *Jewell-LaSalle* is not anomalous, that it is in accord with the conclusion reached in other jurisdictions with like approaches to copyright.

There are special reasons to maintain the harmony between the rule in this country and the rule abroad. Under arrangements between ASCAP and its foreign counterparts, American authors, composers and music publishers receive fees when their works are performed in restaurants, hotels and other public places in Britain, Australia, France, Germany and elsewhere. In Canada, the fees they

* And in New Zealand, where the statutory scheme is similar. New Zealand Copyright Act of 1962, §§38(5), 60.

receive from Canadian broadcasters take into account the statutory exception and the administrative costs allegedly saved by that exception. Similarly, foreign authors, composers and musical publishers receive fees from performances in American restaurants, hotels and other public places of their copyrighted works. To overturn *Jewell-LaSalle* at this late date would disturb this well-established relationship.

2. *The Legislatures Have Accepted the Rule.*

Legislatures both here and abroad have adopted *Jewell-LaSalle's* approach to what constitutes a "performance." As previously noted, even the Canadian and New Zealand Copyright Acts expressly recognize that conduct like respondent Aiken's is conceptually a "performance" of material broadcast by a radio station, then proceed to create a special arrangement for enforcing the rights involved.

More important, both Houses of the United States Congress have fully endorsed the principle of *Jewell-LaSalle.* The legislative history is discussed at greater length later in this brief. It should suffice for present purposes to note that every copyright revision bill introduced in either House since 1957 has incorporated *Jewell-LaSalle,* and that each such bill to pass through either House followed the 1931 rule. See, for example, H.R. 2512, 90th Cong., 1st Sess., approved by the House of Representatives in 1967, and S. 1361, 93rd Cong., 2d Sess., approved in the Senate by a 70 to 1 vote in September of 1974. The relevant portions of S. 1361 (S. 22 in the present Congress) are set forth as Appendix G1-9 hereto.

IV.

Jewell-LaSalle should be adhered to in order to vindicate the business relationships developed in legitimate and justified reliance thereon over the past forty years.

The trial judge found, and the record establishes without contradiction, that significant economic interests have developed in reliance upon *Jewell-LaSalle*. When the decision was announced over forty years ago, ASCAP on behalf of its members immediately began to negotiate licenses under which commercial establishments like hotels and restaurants agreed to pay modest monthly fees for the use of copyrighted music to entertain customers and employees. The agreements negotiated with broadcasters since 1932, providing for fees for performance only at the point of broadcast, were carefully geared to fit *but not overlap* the hotel and restaurant licenses. Background music operators like Muzak contend that *Jewell-LaSalle's* continued viability has a bearing upon the license arrangements that they have negotiated with ASCAP.

The District Court found, and the Court of Appeals did not disagree, that if *Jewell-LaSalle* were abandoned, this intricate network of licenses so important to the welfare of the nation's composers, authors and music publishers, would be jeopardized. Even respondent has not disputed that damage would be done should he prevail. He counters with the lame proposition that the dollars involved are relatively few—"only" a few million. The dollars are relatively few, for that segment of the world of music occupied by composers, authors and music pub-

lishers *is* slight and fragile. But however unimpressive in purely monetary terms when compared with the fast food business or the broadcasting industry, it surely is not casually to be sacrificed. In *Flood* v. *Kuhn*, 407 U.S. 258 (1972), this Court did not, after all, adhere to *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), and vindicate the reliance interest there asserted, on the basis of the number of dollars involved.* Instead, the Court responded to the "unique" role of baseball as an institution, and to pleas for fairness and continuity. See 407 U.S. at 282. With all due respect, the claims of the music makers that they have justly relied upon *Jewell-LaSalle* for forty years are at least as persuasive as those of the baseball owners that they relied upon earlier decisions regarding the inapplicability of the antitrust laws to baseball.

In *Flood* v. *Kuhn*, this Court acknowledged that when economic interests develop in fair and reasonable reliance upon past decisions, the Court will honorably vindicate that reliance interest while remaining free to apply other interpretations of the same statutory language to other industries. Thus, although the Court preserved what it conceded to be the "aberration" of baseball's immunity from antitrust regulation, it denied similar immunity to football in *Radovich* v. *National Football League*, 352 U.S. 445 (1957); to boxing in *United States* v. *International Boxing Club*, 348 U.S. 236 (1955); and to the theatre in *United States* v. *Schubert*, 348 U.S. 222 (1955). In music, as in baseball, the "slate is not clean", and it has not been so for nearly half a century. *Cf. Flood* v. *Kuhn*, 407 U.S. at 283.

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* The monetary consequences of overruling *Federal Baseball* were sharply disputed by the parties, and they went unmentioned in the *Flood* v. *Kuhn* opinions.

V.

Congressional action and inaction since 1931 supports adherence to *Jewell-LaSalle*.

In considering whether to adhere to subsequently challenged judicial rulings, this Court has regularly examined relevant legislative action or inaction. In *Flood* v. *Kuhn*, for example, the Court made such an inquiry and concluded that there was more than "mere Congressional silence and passivity" to support adherence to what everybody agreed was an exceedingly anomalous precedent. 407 U.S. at 283. So, too, in *Canada Packers, Ltd.* v. *Atchison, T. & S.F.R.Co.*, 385 U.S. 182, 184 (1966), the Court followed questionable precedent which Congress had been invited to overrule but had not. In *Joint Industry Board* v. *United States*, 391 U.S. 224, 228-29 (1968), the Court preserved a challenged 1959 decision where Congress in the interim had frequently amended the statute but had not enacted proposals to reverse the Court. And in *Walling* v. *Halliburton Co.*, 331 U.S. 17, 25 (1947), the Court declined to overrule a questionable precedent where Congress had let the decision stand and the parties "had regulated their affairs on the faith of it."

The present case is much stronger than these, for as demonstrated above, *Jewell-LaSalle* is not an anomaly. Unlike the Court's concededly "aberrational" treatment of the reserve clause in *Federal Baseball*, *Jewell-LaSalle* won the support of the entire Court, remained unquestioned for decades, and has been followed throughout the world. Indeed, application of the "functional" approach of the

CATV cases suggests that *Jewell-LaSalle* was correctly decided, for the functional equivalent of the conduct in *Jewell-LaSalle* is not the private citizen singing in his shower or watching television in his living room, but commercial use in public places of background music services, records, or live orchestras. And whereas the baseball owners knew for a quarter century that Congress might at any time accept the Court's blunt invitation to strip them of antitrust immunity, the nation's composers, authors and music publishers have had no reason to believe that either Court or Congress would overturn *Jewell-LaSalle.*

Consider the legislative history in some detail. In the years immediately following *Jewell-LaSalle,* numerous bills were introduced to offset the impact of the decision. None passed into law. The first bill, H.R. 12549, 71st Cong., 3d Sess., was introduced in 1931. Section 1(g) called for an exemption for the reception of music by radio receivers except where an admission charge or service fee is assessed by the set owner. This bill passed the House, but failed in the Senate.* In 1932 six bills were introduced, Section 12 of each providing exemptions for the reception of any copyrighted work "by the use of receiving, reproducing, or distributing apparatus," absent an admission or similar charge. H.R. 10364, H.R. 10740, H.R. 10976, H.R. 11948, H.R. 12094, and H.R. 12425 (72d Cong., 2d Sess. 1932). Only one of these bills, H.R. 12094, was reported out of committe; none obtained the assent of the House. In 1935 another bill

* Note that even this and subsequent proposals do not dispute that radio reception and reproduction in a public place is conceptually a "performance." They simply exempt the "performance" from the statutory obligation, and then only where no fee is charged.

was introduced to provide an exemption for reception of a copyrighted work "by the use of a radio receiving set, wired radio or other receiving, reproducing, or distributing apparatus." S. 3047 (74th Cong., 1st Sess. 1935) passed the Senate but failed in the House, and failed again when reintroduced in 1937. S. 7, S. 2031, H.R. 2695, H.R. 3699, H.R. 5275 (75th Cong., 1st Sess. 1937).

In 1940 opponents of *Jewell-LaSalle* changed direction. H.R. 8263 and H.R. 9665 (76th Cong., 2d Sess. 1940) would have reduced the amount of damages for infringement of musical compositions "played in hotels or restaurants" to $10, if there were no entrance fee or cover or similar charge. Neither bill emerged from committee. H.R. 3456 (77th Cong., 1st Sess. 1941) proposed remedies against combinations of copyright owners by conferring jurisdiction upon the Federal Trade Commission to fix fees when the parties could not agree. This, too, was not acted upon.

Finally, the last efforts significantly to curtail the impact of *Jewell-LaSalle* came in 1957 when H.R. 673 and H.R. 4572 (85th Cong., 1st Sess. 1957) proposed that a radio, television, or phonograph record reproduction—in a hotel only—"shall not be deemed a public performance for profit." Both died in committee.

All copyright revision bills since 1957 have sought to codify *Jewell-LaSalle,* rather than circumscribe it. A series of such bills have been introduced in successive Congresses since 1964. One, H.R. 2512, 90th Cong., 1st Sess. (1967), passed the House in 1967. Another, S. 1361, 93d Cong., 2d Sess. (1974), passed the Senate in 1974.* All

* The other bills were H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835, 89th Cong., 1st Sess. (1965); S.597, 90th Cong., 1st Sess. (1967); S.543, 91st Cong., 1st Sess. (1969); and S.644, 92nd Cong., 1st Sess. (1971).

follow *Jewell-LaSalle* in defining the reproduction of radio music over loudspeakers in a public place as a "performance." Authorization from the copyright owner is required except where the "performance" is through single radio receivers of the kind commonly used in private homes, unconnected to additional loudspeakers. The exception reflects ASCAP's historic practice of not requiring licenses from "Mom and Pop" stores using home-type radios without additional loudspeakers.

S. 1361, adopted by the Senate by a vote of 70 to 1 on September 9, 1974, is illustrative. Section 106 of S. 1361 (S. 22 in the present Congress) would confer upon a copyright owner the exclusive right to, and to authorize, the public performance of copyrighted works. Section 110 would provide that

> "Notwithstanding the provisions of section 106, the following are not infringements of copyright . . .
>
> (5) communication embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public;"

This same formula had previously been adopted by the House in 1967. See Section 110(5) of H.R. 2512. It has not been controversial, and is highly likely to form a part of any revised Copyright Act. S.1361 would have been enacted into law by now were there not a continuing dispute about the treatment to be accorded CATV.

The significance of these legislative proposals is two-fold. First, these bills reflect the modern judgment of both Houses of Congress that reception in public places of copyrighted music on a radio receiver *is* a "performance," both analytically and from the view of legislative policy. Even reception on a small radio receiver, without additional loudspeakers, of the type used in a private home *is* deemed a "performance," and subject to copyright liability where the set owner charges a fee to hear the broadcast.

Second, it is noteworthy that modern legislative draftsmen do not find it anomalous to provide different treatment for radio reception of copyrighted music and for the functions performed by CATV systems.* Each of the recent proposals in the Congress deals separately with the problem of CATV transmissions. Some bills delegate to the Federal Communications Commission authority to require compensation by CATV systems to copyright proprietors. S.1361 declares CATV operations a "performance," provides for compulsory licensing, and mandates a complex schedule of royalties. If there is any present intent in the Congress to overturn copyright decisions of this Court, it is the CATV decisions that are at hazard, not *Jewell-LaSalle*.

With respect to completed legislative action, Congress has since 1931 enacted more than two dozen amendments to the Copyright Act of 1909. In no instance has any amendment impaired the viability of *Jewell-LaSalle*. See App. H1-2 hereto.

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* The British Copyright Act of 1956 also provides disparate treatment for the two types of conduct. Use of a radio in a public place is a "performance," §48(6), whereas "the causing of a work or other subject-matter to be transmitted to subscribers to a diffusion service, shall not be taken to constitute performance." §48(5).

To the extent that Congress has spoken through legislation, through serious and well-supported legislative proposals such as S.1361, and through refusals to act, its position has been consistent. *Jewell-LaSalle* has become an integral part of our copyright law, with the full concurrence of the Congress. It is this Court's policy to give weight to such a legislative judgment.

Conclusion

Jewell-LaSalle controls this case. *Jewell-LaSalle* has not been overruled. A "functional" test leads inexorably to the conclusion that commercial establishments which use radio receivers and loudspeakers as a substitute for live orchestras, records, or background music services are engaged in equivalent conduct and should be treated the same. The intricate contractual network legitimately and justifiably developed in reliance upon the decision in *Jewell-LaSalle* should be vindicated. And congressional action and inaction over the past 40 years leave no room for respondent's arguments in support of the decision below.

Music in America must not become the victim of a wooden jurisprudence. The fragile economic infrastructure that supports our composers, authors and music publishers must be preserved against erosion by the use of talismanic phrases torn out of context from this Court's CATV decisions. There is no need to inflict upon so im-

portant a cultural institution as music the damage threatened by the decision below. Indeed, every sound reason suggests that the decision be reversed.

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January, 1975